IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 15099

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS, GUIDED MISSILE LODGE 1254, *Respondent*

On Petition For Enforcement Of An Order Of The National Labor Relations Board

---

BRIEF FOR THE RESPONDENT, INTERNATIONAL ASSOCIATION OF MACHINISTS, GUIDED MISSILE LODGE 1254

PLATO E. PAPPS
Chief Counsel

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

AUTHORITIES CITED

CASES:

STATUTE: Page

MISCELLANEOUS:

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 15099

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS, GUIDED MISSILE LODGE 1254, *Respondent*

On Petition For Enforcement Of An Order Of The National Labor Relations Board

---

BRIEF FOR THE RESPONDENT, INTERNATIONAL ASSOCIATION OF MACHINISTS, GUIDED MISSILE LODGE 1254

JURISDICTION

This case is before the Court upon a petition of the National Labor Relations Board pursuant to Section 10 (e) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151 *et seq.*),[1] for enforcement of against Respondent Union, following proceedings under its order (R. 99-101, 103-104)[2] issued on March 22, 1955,

---

[1] The pertinent provisions of the Act are appended hereto (pp. 13-16, *infra*).

[2] References to the printed record and proceedings are designated and preceded by "R".

Section 10 of the Act. Respondent in resisting the Board's Order and Petition for Enforcement denies that it has committed unfair labor practices as alleged and found. (Respondent's Answer R. 110-112).

Respondent concedes that this Court has jurisdiction of this proceeding, the alleged unfair labor practice having occurred at Pomona, California, within this judicial circuit.

The Board's Decision and Order is reported at 111 N.L.R.B. 1055.

STATEMENT OF THE CASE

The facts set forth in the Board's Statement of the Case are substantially accurate. The Board, however, (quite properly from its point of view) has emphasized certain aspects of the case and under-emphasized others. We believe, therefore, that it may be useful to attempt to correct the error and to balance the facts by pointing up certain elements in the procedural and factual situation.

PRELIMINARY STATEMENT

The Board's brief reflects that it has "lodged with the Clerk of the Court" a copy of Respondent's Brief in Support of Exceptions which had been filed during the course of the administrative proceedings.[3] In addition, the Board's brief refers to and relies upon arguments and statements contained in that brief—in fact the document is intertwined and interwoven with such references.[4] However, such "lodging", reference, and arguments, are, in the opinion of the undersigned, improperly before the Court for several reasons: first, the Respondent's brief before the administrative agency was not under Rule 17 of this Court designated as part of the "Transcript of Record"; second, the Respondent, until it had received

[3] Board's brief p. 4, fn. 5; p. 17, fn. 12.

[4] Board's brief pp. 4, 10, 11, 12, 15, 16 and 17.

the Board's brief, had no knowledge that the Board had "lodged" the "brief" with the Clerk of Court nor that it was to be bound by the gratuitous statements and arguments it contained; third, the references and arguments to that brief are speculative, in any event, and are not germane to the issues presented; and, fourth, the case is now before the Court in a different posture than that before the administrative tribunal. For these reasons, we respectfully move the Court in conformity with its Rule (17) to ignore all references and arguments relating to the Respondent's prior brief before the Board, and referred to in the Board's brief at pages 4, 10, 11, 12, 15, 16 and 17.

THE DISCHARGE OF PENSE

Charles Pense, an employee of the Company within the bargaining unit, at all times material, was discharged at the request of the Union on January 15, 1954 for failure to maintain membership in the Union as required by a "maintenance of membership" provision in the then existing collective bargaining agreement. (R. 35-36; 46; 48-49; 53; 117-118; 120; 140-143; 144-145; 146).

Briefly, the union security provision required, as a condition of employment (1) that all employees who are or become members of the union pay initiation fees, monthly dues and assessments; (2) that employee-members of the union separated from the unit shall upon rehire again "pay regular dues", but not while outside the scope of the bargaining unit; and (3) that employee-members of the bargaining unit when separated, upon "reemployment" in jobs within the bargaining unit shall again pay membership dues in accordance with (1) above.[5] (R. 144-145)

Following Pense's discharge the Board issued its complaint alleging that the union violated Sections 8(b)(1)(A)

---

[5] The text of the "maintenance of membership" clause appears in the Board's statement of the case, as well as at page 144 of the Transcript of Record.

and (2) of the Act because the union security clause in question was illegal. (R. 7-15) The Respondent, in its answer, admitted it caused the discharge of Pense in accordance with the terms of the contract but denied violations of the statute, affirmatively pleading that such discharge was in accordance with the terms of "a valid and legal agreement" and that "all acts by either the Company or the Union in connection with the termination of Pense was proper and legal in all respects." (sic) (R. 17-18)

After a hearing on the matter, the Board issued its Decision and Order finding that the union security provisions were "unlawful" and that the Union violated 8(b)(1)(A) and (2) of the Act for the reason that the "lawful requirements therein—[the payment of initiation fees and monthly dues][6] are so interwoven with the unlawful ones—[the requirement for the payment of assessments, and the failure to grant the 30-day grace period]—as to be tainted with illegality"; and for this reason "no valid union-security clause is available as a defense to the discharge of Pense".[7] (R. 93-94)

It then issued its Remedy and Order requiring the Respondent to take certain affirmative and negative action. (R. 94-107)

ARGUMENT

I. The Discharge of Pense was Caused by the Union in Accordance with the "Valid" Union-Security Requirements of the Agreement Even Assuming Arguendo that Some Portions of the Union-Security Provisions were "Invalid".

The record is undisputed that at all times material to his discharge, Pense was a member of the bargaining unit who as a condition of continued employment was required

---

[6] The Board in its Decision concedes that "the requirement for the payment of initiation fees and monthly dues is, of course, *a valid one when considered in isolation*". (R. 94, fn. 10) (Emphasis ours)

[7] The Board, in its Decision and Order and its Petition for Enforcement did not decide or adopt the other conclusions of the Trial Examiner relating to Respondent's motive for requesting Penses' discharge. (R. 94, note 10)

to pay dues according to the terms of the contract. Pense, at his own election, chose to stop paying dues in accordance with the contract's requirements and accordingly was, at the Union's request, discharged by the Company. The Board in discussing the contract's union security provisions concluded that the "lawful requirements therein [were] so *interwoven* with the unlawful ones as to be tainted with illegality themselves". A phrase we believe to have been adopted from dicta in the late Justice Jackson's opinion in *N.L.R.B.* v. *Rockaway News Supply Company,* 345 U.S. 71, 78, wherein speaking for the Court he said:

> "We do not, of course, question that there may be cases where a forbidden provision is so basic to the whole scheme of a contract and so *interwoven* with all its terms that it must stand or fall as an entirety." (Emphasis ours)

Without in any way conceding that the contract in any form was invalid, the question thus presented is whether the contract and its union security provisions was so interwoven with illegality that all its terms stand or fall as an entirety. If not, the defense that the discharge was pursuant to a valid union security provision was available to the Respondent, and the enforcement of the Board's Order must be denied, as to any alleged violation of the Act.

We believe that the decision itself negates this finding and conclusion in several respects:

(1) The Board's Decision states (R. p. 89):

> "The union security provisions of the contract . . . is the maintenance of membership variety, . . . [requiring] an employee who is separated from the bargaining unit covered by the contract, at a time when he is a member of the Respondent Union, to resume paying membership dues immediately upon his reemployment within the bargaining unit."

Assuming, *arguendo,* that this clause is not in accord with Section 8(a)(3) of the statute because it did not grant to employees a 30-day grace period, and further, assuming *arguendo* that it is, as the Board found, an "illegal" provision, Pense, at no time, and the record is devoid of evidence to the contrary, was either compelled or coerced or required to abide by that provision in the contract and to this extent, the question of Penses' discharge did not fall within the proscription of 8(a)(3) or (1) of the Act unless such clauses are *per se* violations of the Act. *Contra: Charles A. Krause Milling Company,* 97 N.L.R.B. 536. Indeed he was not discharged for failing to "resume paying membership dues immediately upon reemployment in the bargaining unit". He had never been outside the bargaining unit. In fact, at all times material, Pense was a voluntary member of the Union who elected at his own choice to stop paying dues. Accordingly, neither the statute nor Board policy requires that as a matter of right a member of the union or an employee under all circumstances must have spelled out in a contract as a protection of his rights under Section 7 of the Act the 30 day grace period. See *A. Sandler Co.,* 110 N.L.R.B. 738; *Milwaukee Gas Light Co.,* 111 N.L.R.B. 837. It would appear from the foregoing cases, that the Board would now apply different standards of interpretation and application to contracts under Section 8 than it does to contracts under Section 9 of the Act, even though the permissive language of Section 8 relating to union security clauses, directly controls and applies to such provisions, and its effect on rights of employees under Section 7 of the Act, whether the question relates to contract bar issues in questions concerning representation under Section 9 or unfair labor practices relating to Section 8. This inconsistency in policy affords no guide either to employees, unions, or employers, who attempt to conform their valid rights under the Act to the Board's ever changing whims, interpretation of the statute, and natural inclination to police labor contracts. In the face of such inconsistency, we often wonder what the Board would do

if it were ever faced with the problem of day-to-day collective bargaining?

Plainly speaking, Sections 8(a)(3), 8(b)(2) and 8(b)(1)(A) forbid discrimination against employees *except* where there is in effect a union security contract. The unlawful discrimination, if any occurs *when* an employee's *employment* is affected because of the *failure* of the Employer and the union to accord to the employee the 30 day period within which to join or refrain from joining the union, or where the employee is encouraged or discouraged in membership in a labor organization but not because the language of the contract fails to grant this right. (*A. Sandler Co.,* 110 N.L.R.B. 738; *Milwaukee Gas Light Co.,* 111 N.L.R.B. 837; affirming *Charles A. Krause Milling Co.,* 97 N.L.R.B. 536.)

In the case at bar, Pense was a member of the union prior to and during most of the time of his employment. He was not required *to join* the union under the terms of the contract—the contract being as found by the Board a "maintenance of membership" variety. For this reason, it follows, under well established Board doctrine that the contract did not have to grant to him the 30 day period under the statute. *A. Sandler Co.,* 110 N.L.R.B. 738; *Milwaukee Gas Light Co.,* 111 N.L.R.B. 837 (affirming *Charles A. Krause Milling Company,* 97 N.L.R.B. 536). For example, in *Charles A. Krause Milling Company,* 97 N.L.R.B. 536, the leading case on the subject, the Board in discussing the 30 day grace period in Section 8(a)(3) of the Statute said:

> . . . we are mindful of the fact that the union-security clause in that case provided for maintenance of membership, a lesser form of union-security than the union shop. It is clear that under such a clause, as under a union-shop provision, *a grace period need not be accorded to an old employee who already was a member of the union on the effective date of the contract.* (emphasis ours)

The Board's dicta in its decision that a member of the union stands in the same shoes as a new employee when reemployed is not germane to the issue here, and for purposes of this case is conjecture and speculation based on nothing that the record facts support or that even remotely relate to Pense's discharge. In short, the finding speculates and conjects as to what Pense's status is or would have been, or what the union would have done had Pense been reemployed or rehired, and, is something that need not be decided here.

(2) The Board also found that the mere inclusion in the contract of a requirement calling for the payment of "assessments" exceeded the "permissive" language of Sections 8(a)(3) and acted as a "restraint upon employees desiring to refrain from union activities within the meaning of Section 7 of the Act.[8] It then went on to find that such a requirement was in violation of 8(a)(1) and 8(b)(1)(A) of the Act—but, because this requirement in the contract was not "enforced", it did not violate other provisions of the Act; i.e., Sections 8(a)(3) or 8(b)(2). (R. 89-92) Here again, the Board in its discussion selected and separated the so-called "illegal" provisions of the agreement from the "legal" provisions requiring the payment of dues as a condition of employment. It did so when it conceded that "the requirement of the payment of initiation fees and monthly dues is, of course, a valid one when considered in isolation". (R. 94, fn. 10) Yet while it could so separate the clauses for discussion of the case, it should be noted that it could not so do for purposes of its ultimate findings and conclusions. Be that as it may, Pense was not discharged for his failure to pay "assessments", and so the Respondent while found guilty of 8(b)(1)(A) of the Statute, was found not guilty of violating other provisions of the Act. We submit that Pense was discharged for his failure to pay "dues" in accordance with the terms of the

---

[8] This defect, if any, was cured in the 1954 contract. (R. 96, note 16)

contract and for no other reason. A reason permitted under the Act. Senator Taft, one of the co-founders of the Act, at page 20 of the Report (Senate Report 105, 80th Congress, 1st Session (1947)) accompanying S-1126 which was without substantial change, adopted in the present Act, stated with respect to Sections 8(a)(3) and 8(b)(2):[9]

> Section 8(a)(3): . . . The committee did not desire to limit the labor organization with respect to either its selection of membership or expulsion therefrom. But the committee did wish to protect the employee in his job if unreasonably expelled or denied membership. The tests provided by the amendment are based upon facts readily ascertainable and do not require the employer to inquire into the internal affairs of the union.
>
> * * *
>
> Section 8(b)(2): This is designed to protect individual employees from discrimination in employment induced by a labor organization which has a union-shop contract with an employer, entered into pursuant to the provisions of section 9(e) and in compliance with the conditions in section 8(a)(3). The labor organization may not persuade or attempt to persuade the employer to discriminate against an employee except for two reasons: First, that the employee has lost his union membership by failing to tender the dues or initiation fees uniformly required as a condition of membership; second, that the employee, at a time when the Board would not entertain a petition to determine representation pursuant to section 9(c)(1)(A), has engaged in activity on behalf of another labor organization or in activity having as its objective the termination of the exclusive representative status of the union. *It is to be observed that unions are free to adopt whatever membership provisions they desire, but that they may not rely upon action taken pursuant to those provisions in effecting the discharge of, or other job discrimination against, an employee except*

[9] Senate Committee on Labor and Public Welfare, Miscellaneous Hearings, Reports, etc., 1947-1948, Vol. 2, Senate Report 105, pages 20, 21, 80th Cong., 1st Sess. (1947).

> *in the two situations described.* Thus, an employee, even though he loses his union membership for reasons other than those set forth, may not be deprived of his job because of a contract requiring membership as a condition of employment. (Emphasis supplied)

From the foregoing, it is clear that unless the *discharge* was for any reason *other* than Pense's failure to tender periodic dues and initiation fees it was a violation of 8(a)(3) and (b)(2) of the statute. It also follows that because the discharge was for non-payment of dues, the affirmative defense was available to the Respondent, and, that the discharge was not in violation of the statute.

II. The Board's Order Should Not be Enforced Because it Requires of the Respondent Nothing More Than What it Did—Namely Not to "Request the Discharge of Said Pense or any Other Employee for a Reason Other Than a Failure to Tender Dues . . ."

In its Order (R. 100) at paragraph (2), the Board requires the Union to

> "Notify the Respondent Company and Charles E. Pense, in writing that it has no objection to the employment of Pense and that it will not in the future request *the discharge* of said Pense or any other employee for a reason other than a failure to tender monthly union dues or initiation fees uniformly required to acquire or maintain membership in the Respondent Union as a condition of employment, under an agreement authorized by Section 8(a)(3)." (emphasis ours)

Undisputed is the evidence relating to the reason for Pense's discharge. Remaining however for consideration is the question—are these various clauses illegal *per se* under Section 8(a)(3) of the Act, and if so, what effect, if any, did the so-called "illegal" provisions have on Pense's

discharge. We say that they are not *illegal per se* nor did they affect Pense's discharge. *cf A. Sandler Co.,* 110 N.L.R.B. 738; *Milwaukee Gas Light Co.,* 111 N.L.R.B. 837; *Rockaway News Supply Co.,* 345 U. S. 76. Because at no time was the discharge caused pursuant to these so-called "illegal" provisions. As the Supreme Court said in *Rockaway News Supply Co.,* 345 U. S. 76-77:

> "There are two obstacles in the way of the Board's complete disregard of this contract. The first is that, even if inclusion of a forbidden provision is enough to justify the Board in setting it aside as to the future, it does not follow that it can be wholly ignored in judging events that occurred before it was set aside. It is one thing for the Board to say that the parties should not go on under such a contract; it is another to say that no effect whatever may be given to a contract negotiated in good faith by the union and the employer which both believed to be valid and operative, to which both were conforming their conduct, and which no authority had yet held void."

Accord, *N.L.R.B.* v. *United Electrical, Radio, and Machine Workers of America, Local 622 (UE),* 203 F. 2d 673 (C. A. 3) in which the Court, in denying the Board's petition for enforcement, said concerning the failure of the parties to provide the 30-day grace period in the contract insofar as it affected new employees:[10]

> "We cannot accede to the Board's contention. In our view the statutory requirement for the minimum joining period of 30 days following the effective date of a union-security agreement is but a temporary transitional provision which, although it must, of course, be read into every such agreement, need not necessarily be expressly included on pain of invalidating the entire union-security provision. *Collective bargaining agreements are not to be so strictly and technically construed.* National Labor Relations Board

[10] We submit that this conclusion in the Court's decision is equally true with respect to briefs submitted to the Board by "laymen unschooled in the niceties of legal draftsmanship."

v. Rockaway News Suppy Co., 1953, 345 U. S. 71, 73 S. Ct. 519. *They are practical working arrangements frequently drawn by laymen unschooled in the niceties of legal draftsmanship.* Where, as here, such a contract exhibits substantial compliance with the statute we cannot hold the union-security clause to be void. We conclude that the Board erred in doing so and thereupon in holding that Gozdick's discharge was unlawful." (emphasis ours)

Relying as we must upon the Supreme Court's holding in *N.L.R.B.* v. *Rockaway News Suppy Co.* (*supra*), as well as prior Board and Court decisions, the mere failure to include within the body of an agreement a "30-day grace" period or the inclusion in the contract of the requirement of the payment of assessments did not justify the Board's broad finding that the union security clause was not available as a defense to Pense's discharge. We contend that the defense that the discharge was not in violation of the statute was available to the Respondent; that no substantial evidence supports the Board's finding of unfair labor practices; that the Union was entitled to seek as it did Pense's discharge for nonpayment of dues; and, that Pense should be neither reinstated nor reimbursed according to the Board's Order. As the Court correctly concluded in *Rockaway News,* "Substantive rights and duties in the field of labor-management do not depend on verbal ritual reminiscent of medieval real property law". *N.L.R.B.* v. *Rockaway News Supply Co.,* (345 U. S. 71, 75)

CONCLUSION

For the reasons stated, it is respectfully submitted that the Board's Petition For Enforcement of its Order should be denied.

Plato E. Papps
Chief Counsel
International Association of Machinists,
AFL-CIO

August 23, 1956

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151 *et seq.*), are as follows:

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Unfair Labor Practices

Sec. 8. (a) It shall be an unfair labor practice for an employer (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

(3) by discrimination in regard to hire or tenure of employment or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made: * * * *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has rea-

sonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

REPRESENTATIVES AND ELECTIONS

"SEC. 9. (a) Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment:

* * *

(c) (1) Upon the filing with the Board by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8 (a) (3), of a peti-

tion alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

* * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means or adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of act and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or re-

straining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *